

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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|---------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | 4:07CR3005 |
| |) | |
| V. |) | |
| |) | |
| RICHARD FLEMING, |) | MEMORANDUM AND ORDER |
| |) | |
| Defendant. |) | |
| |) | |

This matter is before the court on Defendant’s notice of appeal, motion for certificate of appealability and motion to appoint counsel ([filing 189](#)). The notice of appeal is filed with reference to the court’s judgment entered on October 9, 2009 ([filing 188](#)), which dismissed with prejudice Defendant’s motion to vacate, set aside, or correct his sentence pursuant to [28 U.S.C. § 2255](#).

Before Defendant can appeal this court’s decision denying his § 2255 motion, a certificate of appealability must issue. [28 U.S.C. § 2253\(c\)\(1\)\(B\)](#). A certificate of appealability may issue under [28 U.S.C. §2253](#) “only if the applicant has made a substantial showing of the denial of a constitutional right.” [28 U.S.C. § 2253\(c\)\(2\)](#). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 petition, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” in order to meet the standard contained in § 2253(c). [Slack v. McDaniel, 120 S. Ct. 1595, 1604 \(2000\)](#). In contrast, when a district court denies a § 2255 petition on procedural grounds without reaching the applicant’s underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of

reason would find it debatable whether the district court was correct in its procedural ruling.” Id.

For the reasons set forth in this court’s memorandum and order denying the § 2255 motion ([filing 187](#)), the court concludes that Defendant has not made a substantial showing of the denial of a constitutional right within the meaning of [28 U.S.C. § 2253\(c\)](#). Therefore, a certificate of appealability will not be issued.

Defendant was determined to be financially unable to obtain an adequate defense in his criminal case, and an attorney was appointed to represent him at trial. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, Defendant may proceed in forma pauperis on appeal pursuant to [Federal Rule of Appellate Procedure 24\(a\)\(3\)](#).

However, Defendant’s motion for appointment of counsel shall be denied without prejudice to Defendant filing a motion for appointment of counsel in the United States Court of Appeals for the Eighth Circuit.

Accordingly,

IT IS ORDERED:

1. Defendant’s request for the issuance of a certificate of appealability ([filing 189](#)) is denied, and a certificate shall not issue in this case;
2. Defendant shall be permitted to proceed in forma pauperis on appeal;
3. Defendant’s motion to appoint counsel ([filing 189](#)) is denied without prejudice to Defendant filing a motion for appointment of counsel in the United States Court of Appeals for the Eighth Circuit;

4. The Clerk of the United States District Court for the District of Nebraska shall provide a copy of this order to the Eighth Circuit Court of Appeals.

October 20, 2009.

BY THE COURT:

Richard G. Kopf

United States District Judge

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